

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JAMES SHARKEY,

Case No. 2:18-cv-0025-KJD-BNW

Plaintiff,

ORDER

V.

NAPHCARE, INC., *et al.*,

Defendants.

12 Before the Court is plaintiff James Sharkey’s motion to amend (ECF No. 81), his motion
13 to excuse the late filing of his amended complaint (ECF No. 84), his second premature motion
14 for summary judgment (ECF No. 91), and his motion for jury trial in the alternative to his motion
15 for summary judgment (ECF No. 117). Both NaphCare and the Clark County defendants have
16 timely responded to Sharkey’s filings (ECF Nos. 87, 89, 93, 103, 119), and Sharkey has replied
17 (ECF Nos. 88, 104, 105, 109, 120). The defendants have also moved to stay the summary
18 judgment briefing schedule (ECF No. 100) to which Sharkey responded (ECF No. 106).¹ On
19 November 8, 2019, this Court issued an order disposing of seven similar motions, including
20 Sharkey’s first motion for summary judgment, his motion to “assert jurisdiction,” motion to
21 amend his complaint, and motion to extend his copy-work budget. See Order, ECF No. 61. In the
22 six months since that order, Sharkey has disregarded the Court’s advice to use his copy work
23 sparingly and has filed five more motions, which are either untimely or meritless. Indeed, it
24 seems as though every time the Court resolves one of Sharkey’s motions, three more sprout in its
25 place.

²⁷ There are two more motions pending: Sharkey's Motion for Appointment of Counsel (ECF No. 90) and
²⁸ the County Defendants' Motion to Strike Sharkey's Declaration of Faith (ECF No. 122). The Court will resolve those motions in separate orders. See Dietz v. Bouldin, 136 S.Ct. 1885, 1892 (2016) (the Court has the inherent authority to manage its docket for the efficient resolution of its cases).

1 For the reasons below, each of Sharkey's motions, including his premature motion for
 2 summary judgment, is denied. Because Sharkey's motion for summary judgment is denied, the
 3 defendants' motion to stay the briefing schedule on that motion is denied as moot.

4 **I. Background**

5 The parties and Court are familiar with the facts of this case. Only a brief review is
 6 needed here. Sharkey's claims arise out of his time at Clark County Detention Center ("CCDC")
 7 as a pre-trial detainee. The claims break down into two groups: claims arising out of alleged
 8 assaults by CCDC officers and a claim arising out of CCDS's interference with Sharkey's
 9 religious worship while incarcerated. As was the case in the Court's earlier order, Sharkey's
 10 religious discrimination claim is not relevant to these motions. As for the officer-involved
 11 assaults, Sharkey claims that CCSD officers cornered and beat him on two separate occasions.
 12 The first time, an Officer Neville assaulted Sharkey in his cell, choking him and punching him
 13 until he lost consciousness. Sharkey was allegedly assaulted the second time by an Officer
 14 Kelsey. Sharkey brought claims for excessive force, failure to protect, and conditions-of-
 15 confinement claims against CCSD, Sheriff Lombardo, and various named and unnamed CCSD
 16 officers. Sharkey also brought an inadequate medical care claim against NaphCare and unnamed
 17 NaphCare employees under the Fourteenth Amendment.²

18 NaphCare moved to dismiss Sharkey's Fourteenth Amendment claim against the entity
 19 and its employees. Mot. to Dismiss, ECF No. 23. As for NaphCare the entity, the motion argued
 20 that Sharkey had not alleged adequate facts to support a policy or practice that informed
 21 NaphCare's indifference to his medical needs. NaphCare also argued that it could not be liable
 22 under the Fourteenth Amendment merely because it employed a tortfeasor. The Court agreed,
 23 finding that "Sharkey failed to allege that a NaphCare policy or custom caused his injury." Order
 24 7, ECF No. 61. The Court came to a similar conclusion regarding NaphCare's unnamed
 25 employees. Sharkey's allegations simply did not support a Fourteenth Amendment claim because
 26 "Sharkey [had] not alleged more than mere negligence against any of the individual NaphCare

28 ² Sharkey brought several other claims against several other defendants. However, the Court's initial
 screening order whittled the claims down to the claims listed here.

1 doctors or nurses.” *Id.* at 6.

2 The Court granted NaphCare’s Motion to Dismiss on November 8, 2019. Despite
 3 granting the motion in its entirety, the Court recognized that Sharkey was proceeding pro se,
 4 unaided by counsel. In an effort to allow Sharkey the leeway afforded pro se parties, the Court’s
 5 order spelled out the ways Sharkey’s complaint was deficient and gave him thirty days to amend
 6 if he chose. The Court trusted thirty days would give Sharkey ample opportunity to review the
 7 deficiencies identified in the Court’s order and fix them. Sharkey missed the deadline by more
 8 than a month and then filed a motion for leave to amend his complaint (ECF No. 81) and a
 9 motion to excuse his late filing (ECF No. 84). Those motions set off flurry of filings, including
 10 the defendants’ responses and Sharkey’s motion for summary judgment (ECF No. 91) and
 11 motion for jury trial (ECF No. 117). The defendants have responded to each of Sharkey’s
 12 motions, and they are now ready for decision.

13 **II. Legal Standard**

14 The constitution guarantees indigent parties “meaningful access to the courts.” *Bounds v.*
 15 *Smith*, 430 U.S. 817, 821–23 (1977). The Court understands that pro se pleadings may lack the
 16 refinement of retained-counsel’s filings. As a result, the Court holds these documents to a “less
 17 stringent standard[] than formal pleadings drafted by lawyers.” *Estelle v. Gamble*, 429 U.S. 97,
 18 106 (1976). Indeed, the Court construes pro se pleadings liberally and in that party’s favor. *See*
 19 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). That leeway is limited to the allegations in the
 20 pleadings themselves. It does not exempt a pro se party from following the rules of procedure.
 21 *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (pro se parties are still “bound by the rules of
 22 procedure”). Accordingly, the Court will only dismiss a pro se complaint if it is clear that “the
 23 plaintiff can prove no set of facts” that would entitle him to relief. *Estelle*, 429 U.S. at 106.

24 **III. Discussion**

25 For convenience in its evaluation, the Court will evaluate Sharkey’s pending motions in
 26 two groups. The first pair of motions includes Sharkey’s motion to amend (ECF No. 81) and his
 27 motion to excuse late filing of his amended complaint (ECF No. 84). Both motions deal with
 28 Sharkey’s deficient complaint and his failure to meet the Court’s deadline to amend. The second

1 pair of motions includes Sharkey's second motion for summary judgment (ECF No. 91) and his
 2 motion for jury trial (ECF No. 117). The remaining motion was filed by defendant NaphCare,
 3 Inc. and asks the Court to stay briefing on Sharkey's motion for summary judgment (ECF No.
 4 100). The County Defendants joined the motion to stay (ECF No. 102). That motion is dependent
 5 upon the Court's treatment of Sharkey's summary judgment motion. If the Court denies
 6 summary judgment as premature, as it has once before, the motion to stay will be moot.

7 *A. Sharkey's Motion to Amend and Motion to Excuse Late Filing*

8 Sharkey moved to amend his complaint on January 13, 2020, a month after the deadline
 9 to amend his complaint under the Court's prior order. Sharkey recognized that his motion to
 10 amend was untimely and moved to excuse the late filing on January 23, 2020. Sharkey claims his
 11 late filing is excused because he is a pro se party who is unfamiliar with the discovery process.
 12 Mot. to Excuse 2, ECF No. 84. The Court may excuse a late filing if the party filing the
 13 document shows its neglect was excusable. Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253,
 14 1262 (9th Cir. 2010). Sharkey argues his late filing is excusable because he could not navigate
 15 the discovery process to obtain the information necessary to amend his complaint until after the
 16 deadline to file his amendment. However, the discovery process plays no part in filing an
 17 amended complaint. Discovery is intended to uncover evidence supporting the factual allegations
 18 in a complaint. The deficiencies the Court identified did not need discovery. They needed more
 19 facts. Sharkey's unfamiliarity with the discovery process, therefore, did not influence whether he
 20 could timely amend his complaint. Accordingly, the Court denies Sharkey's motion to excuse his
 21 late filing.

22 Sharkey's failure to amend his complaint within the Court's deadline and lack of
 23 excusable neglect warrant denial of his motion to amend. The Court has construed Sharkey's
 24 pleadings and papers in the light most favorable to him, as a pro se party. See Estelle, 429 U.S. at
 25 106. However, a pro se status does not excuse the party's compliance with the Court's imposed
 26 deadlines. To the contrary, Sharkey remains "bound by the rules" of procedure despite his pro se
 27 status. Ghazali, 46 F.3d at 53. The Court's order granting NaphCare's motion to dismiss clearly
 28 identified the deficiencies in Sharkey's complaint. Then, in an effort to make amendment more

1 feasible, the Court set Sharkey's time to amend to thirty days after entry of its order. The point of
2 setting a definitive deadline was to avoid a situation like this one where a pro se party is unaware
3 of or unsure of the deadlines to file certain motions. In essence, setting a definitive deadline was
4 an attempt to make amendment easier, but Sharkey disregarded the Court's deadline. As a result,
5 Sharkey's current motion to amend is denied as untimely.

6 Even if Sharkey's motion were timely, it would fail because his proposed amendment
7 does not fix the problems in his prior complaint. A party may freely amend its complaint once as
8 a matter of course within twenty-one days of service. Fed. R. Civ. P. 15(a)(1). Any subsequent
9 amendment requires adverse-party consent or leave of the Court. Fed. R. Civ. P. 15(a)(2). The
10 Court generally grants leave to amend unless amendment would be futile or if the proposed
11 amendment would not cure the complaint's deficiencies. Garmon v. Cty. of Los Angeles, 828
12 F.3d 837, 742 (9th Cir. 2016) (quoting AE v. Cty. of Tulare, 666 F.3d 621, 636 (9th Cir. 2012)).

13 The Court identified two major issues with Sharkey's complaint, and the amended
14 complaint would not cure either issue. First, the Court found that Sharkey did not adequately
15 allege a NaphCare policy or custom that caused or exacerbated his injuries. See Order 7, ECF
16 No. 61 (citing Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012) (liability limited
17 to an entity whose official policy or custom causes injury)). Second, the Court found that
18 Sharkey did not adequately allege that NaphCare employees' failure to treat him constituted
19 more than mere negligence. See Order at 7 (citing Castro v. Cty. of Los Angeles, 833 F.3d 1060,
20 1071 (9th Cir. 2016) (Sharkey must "prove more than negligence but less than subjective
21 intent—something akin to reckless disregard").

22 Sharkey's new allegations touch on those issues but still do not plead a plausible claim
23 for relief. As for NaphCare the entity, Sharkey has added the following allegation to demonstrate
24 a policy or custom: "It is a custom of NaphCare Inc. to give little or no care to its patients" and
25 that Sharkey knows this based "on [his] own personal experience with NaphCare and its
26 employees." Proposed Third Am. Compl. 4:2–10, ECF No. 81-1. However, that new allegation
27 merely shows that NaphCare's treatment was supposedly deficient as it relates to Sharkey's
28 individual case. A policy or custom of deficient care necessarily suggests an overriding course of

1 dealing that would extend well beyond one patient. In short, one patient's bad experience with
 2 NaphCare does not itself constitute a policy or custom of behavior. Therefore, Sharkey's
 3 amendment would not cure the deficiency of his claim against NaphCare.

4 Sharkey's new allegations against NaphCare employees meet the same fate. Sharkey's
 5 new complaint makes two changes to his claims against individual NaphCare nurses. First, it
 6 identifies the previously unnamed NaphCare employee as Maggie G., a "basic nurse." Then, the
 7 proposed complaint alleges that Maggie G. discovered that Sharkey's urine may have blood in it
 8 and failed to treat him. The new allegation fails for the same reason the prior allegation failed.
 9 Sharkey has not alleged more than mere negligence, and if he had, his own complaint contradicts
 10 that allegation. As the Court found in its prior order, the nurses' failure to provide the treatment
 11 Sharkey wanted was negligent at worst. The Constitution does not require doctors or nurses to
 12 treat inmates in any particular way. Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977).
 13 They must only give the care necessary to prevent significant injury or the unnecessary infliction
 14 of pain. Conn, Conn v. City of Reno, 591 F.3d 1081, 1095 (9th Cir. 2010), cert. granted,
 15 judgment vacated sub nom. City of Reno v. Conn, 563 U.S. 915 (2011), opinion reinstated, 658
 16 F.3d 897 (9th Cir. 2011). Sharkey's allegations make clear that nurses did so. See Second Am.
 17 Compl. 6E, ECF No. 18 ("the nap care [sic] nursing staff visited several times" for "roughly two
 18 weeks"). None of Sharkey's new allegations can undo his prior admission that NaphCare nurses
 19 provided him consistent care.

20 At bottom, Sharkey's Motion to Amend fails as it was filed well outside the Court's
 21 imposed deadline to seek amendment. Alternatively, the allegations of Sharkey's proposed
 22 amended complaint do not cure the deficiencies in his last complaint, rendering amendment
 23 unwarranted. Accordingly, Sharkey's Motion to Amend is denied. NaphCare and each of its
 24 employees—named or unnamed—are dismissed from this case.

25 *B. Sharkey's Motion for Summary Judgment and Motion for Jury Trial*

26 On January 30, 2020, about three weeks after moving to amend his complaint, Sharkey
 27 moved for summary judgment. Clearly, the Court had not yet ruled on Sharkey's motion to
 28 amend, nor had the parties completed discovery. See Sched. Order, ECF No. 62 (the initial

1 scheduling order set discovery deadline at March 23, 2020). Before the Court could rule on
 2 Sharkey's summary judgment motion, he filed an alternative motion for jury trial in the event the
 3 Court denies his motion for summary judgment. The Court confronted a similarly premature
 4 motion for summary judgment from Sharkey and denied the motion. Denial is also appropriate
 5 here.

6 The purpose of summary judgment is to avoid unnecessary trials by disposing of
 7 factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986);
 8 Nw. Motorcycle Ass'n v. U.S. Dept. of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). It is nearly
 9 impossible to tell whether there is evidence to support factual allegations before the parties
 10 engage in discovery. Thus, the Court may delay its decision or deny a motion for summary
 11 judgment if the nonmoving party has not had the opportunity to gather facts necessary to justify
 12 its position. Fed. R. Civ. P. 56(d). Where the parties have not yet conducted discovery, the
 13 nonmoving party need not present specific reasons for its inability to present evidence to support
 14 its positions. Indeed, that party “cannot be expected to frame its motion with great specificity . . .
 15 as the ground for such specificity has not been laid.” Burlington N. Santa Fe R.R. Co. v.
 16 Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F.3d 767, 774 (9th Cir. 2003).

17 When Sharkey filed this summary judgment motion, the parties were still unsure whether
 18 his second amended complaint or third amended complaint would be the operative complaint in
 19 this case. The defendants had no conceivable way to oppose summary judgment until they knew
 20 exactly what allegations constituted Sharkey's complaint. After all, the Court has only just
 21 decided that issue in this order. See Section IIIA, *supra*. Accordingly, Sharkey's motion for
 22 summary judgment is premature.

23 Sharkey's summary judgment motion also fails on the merits because material issues of
 24 fact exist on nearly every claim. Summary judgment employs a burden-shifting test that first
 25 requires the moving party to produce evidence that no genuine issue of fact exists. The burden of
 26 production then shifts to the non-moving party to demonstrate a triable issue of fact. Matsushita
 27 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Summary judgment fails, if
 28 the moving party cannot meet its initial burden. Sharkey has not met his burden and admits as

1 much in his alternative motion for jury trial (ECF No. 117). There, Sharkey argues that “[t]here
 2 are several issues of material fact that must be resolved which have been raised in [his motion for
 3 summary judgment].” Mot. for Jury Trial 1, ECF No. 117. The Court agrees with Sharkey’s
 4 assessment. Without the parties having conducted the full discovery process, there are several
 5 issues of material fact that must be addressed before summary judgment. Further discovery and
 6 more appropriately filed summary judgment motions may eliminate those issues of material fact.
 7 However, summary judgment is premature at this point. Accordingly, Sharkey’s motion is
 8 denied.

9 As for Sharkey’s motion for jury trial, the Court denies the motion as moot. Following
 10 discovery, each party will have the opportunity to file their own motion for summary judgment.
 11 At that point, the parties’ respective motions will have the benefit of the evidence adduced in
 12 discovery to support their arguments. If any issue of material fact persists after summary
 13 judgment, the Court will route Sharkey’s case to trial automatically. Sharkey has preserved his
 14 right to demand a trial by jury since he filed his first complaint. See Sharkey’s First Compl. 1,
 15 ECF No. 1-1 (“JURY TRIAL DEMANDED” stated under the caption). Therefore, Sharkey’s
 16 request for a jury trial is redundant, and the Court denies it as moot.

17 C. *NaphCare and County Defendants’ Motion to Stay Briefing Schedule*

18 Finally, NaphCare asks the Court to stay the briefing schedule on Sharkey’s summary
 19 judgment motion because the Court has not yet ruled on Sharkey’s request to amend his
 20 complaint and because summary judgment is premature. The County Defendants joined the
 21 motion. As discussed, the Court agrees with NaphCare that summary judgment is premature and
 22 that genuine issues of material fact would preclude even a timely filed motion for summary
 23 judgment at this point. The Court has elected to deny Sharkey’s motion instead of delaying a
 24 decision. Because the motion was denied, a briefing schedule is unnecessary. Therefore, the
 25 Court denies NaphCare’s Motion to Stay Briefing as moot.

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IV. Conclusion

Accordingly, IT IS HEREBY ORDERED that plaintiff James Sharkey's Motion for Leave to Amend (ECF No. 81) and his Motion Excusing Late Filing (ECF No. 84) are **DENIED**. Because Sharkey failed to timely amend his complaint, NaphCare, Inc. and any named or unnamed NaphCare employee is hereby **DISMISSED** from this case.

IT IS FURTHER ORDERED that Sharkey's Motion for Summary Judgment (ECF No. 91) is **DENIED**.

IT IS FURTHER ORDERED that Sharkey's Motion for Jury Trial (ECF No. 117) is
DENIED as moot.

IT IS FUTHER ORDERED that NaphCare's Motion to Stay Briefing Schedule (ECF No. 100) to which the County Defendants joined (ECF No. 102) is **DENIED as moot**.

Dated this 20th day of May, 2020.


Kent J. Dawson
United States District Judge